APPENDIX

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Docket No. 357
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ROSE WARREN

VS

WATERVILLE URBAN RENEWAL AUTHORITY

RESCRIPT
DUFRESNE, J.

This is an eminent domain case. By reason of a change of venue under 14 M.R.S.A. § 508, an Androscoggin County jury awarded the Plaintiff sixty thousand ($60,000) dollars as just compensation for the taking by the Waterville Urban Renewal Authority, defendant, of plaintiff's real estate situated on Temple Court, so-called, in the City of Waterville. Constitution of Maine, Art. I.§ 21. Dissatisfied with the jury award, Mrs. Warren appeals on the grounds which may be consolidated as follows: (1) the trial court erred in denying Plaintiff's motion to strike the value opinion of the defendant's sole expert witness and in instructing the jury to consider it in

their deliberations, for the reason "that the basic hearsay facts upon which he based his opinion was (sic) not found in the evidence and therefore that his opinion was without supporting evidence"; (2) such error deprived the plaintiff of her constitutional rights of due process and the resulting jury award failed to come up to the just compensation required under both the Constitution of the State of Maine and of the United States. We disagree on both counts.

In order to resolve the first issue raised on this appeal, we must review to some extent the conduct of the trial below. Heywood Sawyer, the defendant's expert witness, testified in direct examination, in explanation of the methods followed by him in arriving at his land and building values, that he used factual information gleaned from records in the assessors' office in Waterville, and at the County Registry of Deeds office in Augusta; and that he got his leads as to comparable properties from brokers in the community; that he made personal inspection of the reference comparables;

that he obtained the sale price, the date of sale, the dimensions of the lot and the special circumstances of the sale, if any, from either the buyer or the seller, the broker or banker who participated in the deal; that he secured the gross rental charge from the owner or tenant.

In connection with his land value, he gave the details on 5 separate sales of properties in Waterville which he identified and asserted as comparable to the Warren land. From the date which he had procured as above indicated and from his examination of the lands taken together with his personal inspection of the lands used for value analyses, he testified that in his expert judgment the sum of $25 per front foot represented the fair market value of the Warren land at the time of taking, with adjustments made for depth of the various Warren lots.

This witness further added that he reached his fair market value of the Warren buildings by using several recognized and sound approaches to market

values, such as the reproduction costs less depreciation, sales of comparable properties, and capitalization of income obtained by use of a gross rent multiplier. He explained to the jury the intricate workings of the several scientific devices available for value ascertainment and indicated that in estimating the fair market value of the Warren buildings, he used all three test-formulas as an assist in his ultimate determination as well as a proof-check on the accuracy of the results reached in each of the tests. Counsel for the plaintiff-owner raised no objections to the introduction on direct examination of the details of the selected sales of comparable properties testified to by the defendant's expert, including the sales price, rental charge and other data. He cross-examined fully thereon and had the witness admit that if his sources of information as to the rental charges and sales prices of the comparables properties were in error, then he would be in error, his estimates would vary

and his opinion of value would not be accurate. Defendant's expert used 5 sales of comparables properties in fixing the fair market value of the Warren buildings. His ultimate opinion of the fair market value of the Warren property before the taking was, $6,350 for the land and $41,450 for the buildings, or an aggregate value of $47,800.

It is true that the opinion of an expert as to value should be striken and not be considered as evidence where it is demonstrated during his testimony that his opinion rests wholly or chiefly upon reasons or matters which are legally incompetent or upon principles which are unsound. Boston Gas Co. v. Assessors of Boston, 1956, 334 Mass. 547, 137 N.E. 2d 462, at page 480; San Diego Land & Town Co. v. Neale, 1891, 88 Cal. 50, 25 P. 977; Commonwealth, Department of Highways v. Darch, 1964, Ky., 374 S.W. 2d 490. If it appears that the witness has no reasonable basis whatever for his opinion, then his testimony should be stricken. Arkansas State Highway Commission v. Russell, 1966, 240 Ark. 21, 398 S.W. 2d 201.

The testimony of a professional appraiser properly to be accepted must be based upon sound principles. Farrington v. Maine State Highway Commission, 1963, 159 Me. 95 at page 96, 188 A.2d 483.

In the instant case, the expert opinion was aided by factual data, such as the sales prices and rental charges of comparable properties, which the witness obtained from hearsay sources. He did not have personal knowledge of these details. His qualifications however were not in issue and he was permitted to testify to such facts without any objection from the plaintiff either on the ground that such evidence was hearsay or for any other reason. As a matter of fact, counsel for the Plaintiff during his direct examination of plaintiff's own expert witness countered the defendant's objections that the evidence sought to be introduced was hearsay, with the argument to the Court that he thought it well-accepted law that an expert expresses his opinion first and then explains the basis for it. And the Court siding with the plaintiff on this issue permitted plaintiff's expert to use such hear-

say information and express his opinion of value to the jury, even though he had based the same on comparables the factual details of which he also had obtained from hearsay sources. Furthermore, at an early stage in the plaintiff's direct examination of her own expert witness, defendant's counsel repeatedly objected to certain evidence on the ground that the expert's sources of information were hearsay. In order to speed up the trial and resolve the proper procedural course to be taken, the trial judge conferred with counsel in chambers in the absence of the jury on this very issue. He laid down the ground rules and policy to be followed concerning expert testimony. He indicated that he was going to be liberal in allowing expert witnesses to testify and that all the plaintiff needed to do was to produce experts that in the opinion of the Court possessed sufficient qualifications to express an opinion and that such expert opinion would go to the jury for them to pass upon the weight thereof. The trial judge stated that the same liberality in receiving expert testimony would be extended to the

defendant's expert witnesses. Upon inquiry by the Court as to whether counsel took issue with the Court's intended procedural conduct of the trial respecting the reception of expert testimony, no objections were raised and both counsel manifested acquiescence therein.

Thus, the factual information, such as the sales prices or the rental charges of the comparable properties used by both expert witnesses, even though hearsay, was in the case by consent of both parties. As stated in Goldthwaite v. Sheraton Restaurant et al., 1958, 154 Me. 214, at page 221, 145 A.2d 362, "(I)t has frequently been held by our cort that when evidence is admitted without objection and no motion is made to strike it from the record, it becomes what has been designated as 'consent evidence'. Moore v. Protection Ins. Co., 29 Me. 97; Brown v. Moran, 42 Me. 44; Tomlinson v. Clement Bros. 130 Maine 189, 154 A. 355; Watkins Co. v Brown and McPherson, 134 Me. 473, 188 A. 212.

Plaintiff, after acceding to the announced liberal approach to be used by the Court in the reception of expert testimony and receiving the benefits thereof whereby her own expert witness was permitted to express his detailed information respecting comparable properties was obtained through hearsay sources, cannot successfully object to the admissibility of the condemnor's expert's ultimate opinion of value secured in similar fashion. The plaintiff had gotten her estimates of fair market value before the jury on an agreed procedure acted upon by the trial court, even though her expert had tapped sources of information of a hearsay nature and she had allowed similar testimony of the condemnor's expert witness to reach the jury without objection; to permit her thereafter to change her position, adopt a different tack and seek to remove her adversary's expert opinion of value in the case from consideration by the jury, would not only be unfair to the trial court but manifestly unjust to the opposing litigant. She had agreed to a settled course of trial procedure and she should not be relieved therefrom

to the prejudice of the other party, except for compelling reasons. See Portland Flying Service, Inc. v. Smith, Me., 1967, 227 A.2d 446. A party cannot claim aggrievement from trial conduct which he actively seconded or tacitly tolerated. See Thompson v Perkins, 1869, 57 Me 290.

Our Court in Goldthwaite has clarified the rule respecting the probative value of "consent evidence." Such hearsay evidence "may properly be considered and given its natural and logical probative effect. The fact finder must always, however, weigh such evidence with caution, mindful of its inherent weakness, the same weakness which leads to exclusion upon objection. It may properly be said that such evidence may properly be given weight as corroborative of other competent legal evidence, but will not alone support a verdict of finding." The defendant's expert whose qualifications were admitted had the benefit of personal examination of the Warren properties as well as personal knowledge of the physical layout

of the comparable properties. He was knowledgeable of the fair market value of properties in the area. His use of the hearsay data relating to the purchase price of rental charge of the comparables only served him in support or adjustment of value findings which due to his expertise he could determine otherwise. Such evidence did not stand alone and given proper weight by the trier of thefacts, it could properly affect the other evidence of value introduced by the plaintiff through her witnesses.

The opinion of an expert is not necessarily rendered inadmissible or incompetent because it may be based on knowledge of facts gained from hearsay sources. Any expert worthy of the name must of necessity assimilate prior learning derived from the experiences of others. As an expert witness he draws upon various sources of information whose credibility or trustworthiness he must determine in the light of his expertness. It would completely frustrate the use of expert witnesses if they were obliged to substantiate

each single factor upon which their ultimate opinion must depend upon firsthand personal knowledge or personal experience. If some of theexpert's factual information is derived from sources fairly trustworthy though hearsay and he has as such the ability to co-ordinate and evaluate that information with all the other facts in his possession secured through personal observation, the trial court may in the exercise of sound discretion permit the expert's ultimate opinion to be considered by the jury. Vigliotti v. Campano, 1926, 104 Conn. 464, 133 A. 579; Universal Investment Company v. Carpets, Incorporated, 1965, 16 Utah 2d 336, 400 P.2d 564.

In Isenhour v. State, 1901, 157 Ind. 517, 62 N.E. 40 at page 44, that court stated the rule which meets with our favor:

"Courts have never undertaken to set up a standard of scientific knowledge by which the competency of a witness may be determined, and have not gone to the extent of holding that a scientific witness can only testify from facts learned by him from personal demonstration. The general rule in such cases. . . .seems to be that, where a witness exhibits such a degree of knowledge, gained from experiments, observation, standard books, or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the trial court, in the exercise of sound discretion the right to say when such knowledge is shown,

and to the jury the right to say what the opinion is worth; and, as in all other cases of discretion, this court will review the action of the trial court only when that discretion clearly appears to have been abused."

We must remember that the expert's testimony relating to sales of comparable properties was introduced to show the reasons for the ultimate opinion of value of the witness and not as evidence having independent probative force upon the issue of market value. On the contrary, such evidence merely served to reinforce the value judgment of the witness and as such went to the weight to be accorded the opinion and not to its competency. The extent of the expert's knowledge of the subject matter and of the material data used in formulating his opinion of market value, provided such facts are not based on mere speculation, goes to the weight rather than to the admissibility of his testimony. Territory of Hawaii v. Adelmeyer, 1961, Hawaii, 363 P.2d 979.

And the trial Court in his instructions to the jury pertinently focussed the jury's attention to such evidence and accurately advised the jury that weight of all such evidence was for them to assess in their evaluation of the expert's opinions: "if you should decide that any such opinion is not based on sufficient study, investigation, knowledge or experience; or if you should conclude that the reasons given for in support of the opinion are not sound, you may reject it in part or you may reject it entirely." Such instruction, further amplified in the course of the judge's charge, served to indicate to the jury the natural impact and serviceability of such evidence as the details surrounding the sales of comparables.

The testimony of expert witnesses concerning sales of comparable properties, even where the details thereof such as the sales prices or rental charges are secured from hearsay sources, as in the instant case, is not evidence inherently incompetent or devoid of all probative value, but rather has substantial relevancy to show the basis upon which the expert has formed his professional opinion of market

value of the condemned property.

In Goldstein v. Sklar, 1966, Me. 216 A.2d 298, our Court held that it was not error to permit on direct examination plaintiff's medical expert and examining physician to relate the hearsay history given to him by the plaintiff, where the court instructed the jury not to consider such testimony as evidence of the facts stated, but only as it might support or explain the physician's diagnosis and opinion. We there stated that "(A)ll these declarations made by the patient to the examining physician as to his present or past symptoms are known by the patient who is seeking medical assistance to be required for proper diagnosis and treatment and by reason thereof, are viewed as highly reliable and apt to state true facts." However, we raised a danger light in the use of such testimony when we further said:

"Where this evidence, although relevant and beneficial, is perhaps not absolutely necessary to the attending physician's approach to his diagnosis

and treatment, we would not sanction under the guise of case history, even to the limited extent allowed in this case, a lengthy recital of past treatment with all the minute details thereof. Such evidence must be kept within reasonable legal orbit under the discretion of the presiding justice, so that the jury will not get the impression that the history of past treatment is substantive evidence in the case."

In Goldthwaite, supra, we said that it appeared to be quite generally held that when a medical expert assumes to base his opinion, partly at least, on authorities and not exclusively on his own experience, he may be cross examined with respect to the authorities for the purpose of disparaging or discrediting his testimony.

In Curtis v. Maine Highway Commission, 1964, 160 Me 262, 203 A. 2d 451, an eminent domain case, we ruled that specific estimates of the cost of a remote and indefinite undertaking would not ordinarily be received except when being tested on cross

examination.

In Knox Lime Company v. Maine State Highway Commission, 1967 Me., 230 A.2d 814, at page 827, we reiterated that "except while being tested upon cross-examination he may not testify to estimated detailed costs of such uncertain procedures as extracting the mineral from the earth, processing and marketing it or of future profits from sales."

We recognize that in the case of a value expert investigating the details of the sales prices rental charges or other necessary factual data concerning sales of comparable properties upon which to formulate an opinion of market value of property taken by eminent domain, the same degree of reliability of the hearsay sources of information may not exist as in the case of a patient seeking proper diagnosis and cure from an examinating physician. Even though such hearsay data may be considered as trustworthy by the investigating expert, nevertheless we adopt as the better policy in such cases the Massachusetts rule. Under such rule the expert is permitted to testify to value and thus given an opinion although his knowledge of details is chiefly

derived from inadmissible hearsay sources, because he gives it the sanction of his general experience, but the fact that an expert may so use hearsay data as a ground for his opinion does not make the hearsay detailed terms of a particular transaction such as a sale of comparable property admissible in direct testimony, either as substantive evidence for the purpose of fortifying the opinion of the expert witness or even when offered merely under the guise of the reasons for the opinion. Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 1956, 335 Mass. 189, 138 N.E. 2d 769; Peirson v. Boston Elevated Railway, 1906, 191 Mass. 223, 77 N.E. 769; National Bank of Commerce v. City of New Bedford, 1900, 175 Mass. 257, 56 N.E. 288.

But such evidence may be admitted on cross-examination for the purpose of testing the expert's credibility and good faith, the accuracy and extent of his knowledge, in other words, to try the soundness and weight of his opinion, provided that such evidence of collateral data, as the sale price or rental charge of the comparable property, was

taken into consideration by the expert and entered into his estimate as a factor upon which value was based. See Peirson, supra. Felin v. City of Philadelphia. 1946, 354 Pa. 317, 47 A.2d 227; Berkley v. City of Jeannette, 1953, 373 Pa. 376, 96 A.2d 118; Frontage, Inc. v. County of Allegheny, 1963, 413 Pa. 31, 195 A.2d 515.

The Texas Court in State v. Oakley, 1962 Texas, 356 S.W. 2.d 909 at page 914, represents the opposite view:

"In a sense, of course, testimony of an expert witness concerning comparable sales which he has considered in reaching his opinion touching the value of the property under consideration involves an inquiry into the mental processes of the witness; the real question, however, is whether such testimony, which is inadmissible to prove the facts of such sales as evidence of the value of the property condemned, is likewise inadmissible in another capacity, that is, to show a basis of the opinion value stated by the expert witness and in which capacity the testimony is not hearsay in the true sense. The better reasoned view, in our opinion, is that the testimony is proper in such latter capacity, where as in the case at bar, the testimony is given by a professionally qualified appraiser whose qualifications, and the comparability of the sales to which he testifies, are not challenged. The discretion of the trial judge, particularly in these latter respects, together with the opportunity on cross-examination to bring out facts contradictory

to the statements and conclusions of the expert, and the instruction of the court limiting consideration by the jury of the testimony beyond the purposes for which it was admitted, are substantial safeguards against its misues. Moreover, whatever facilitation of expert testimony in a condemnation proceeding there may be under our holding is available alike to the condemnor and condemnee."

Following that view, we may list: Hance v. State Roads Commission of Maryland, 1959, 221 Md. 164, 156, A.2d 644; Stewart v. Commonwealth, 1960, Ky. 337 S.W.2d 880; State v. Parker, 1960, 225 Or. 143, 357 P.2d 548, 358 P.2d 274; State Highway Commission v. Greenfield, 1965, 145 Mont. 164, 399 P.2d 989 (admissible both as independent substantive evidence of the value of the property to which the comparison relates and as foundation evidence supporting the opinion of the expert witness). See also 31 Am.Jur. 2d, Expert and Opinion Evidence § 141, at page 695; 32 C.J.S. Evidence § 546 (117) at page 445; Annotation in 12 A.L.R. 3rd at pages 1067 - 1080.

We are of the opinion however that to confine to cross-examination, and subsequently to any redirect examination upon matter properly opened up thereby, any inquiry into the details or mental processes by which the expert witness arrives at his conclusion of value, for the purpose of testing his credibility or for laying a predicate for impeachment, is the better rule, although we realize the modern trend of the authorities permitting the same in direct examination as well as in cross.

Thus, we do recognize that a valuation witness may for practical pruposes base the foundation of his opinion sales of comparable properties relying for the necessary facts on the statements of persons who personally participated in the sales or who have personal knowledge of the data to be considered by the expert in reaching his ultimate conclusion of value. Indeed, if each person previously involved in effecting comparable sales should have to be called to the stand to establish

the detailed facts of such sales, it would lengthen litigation of this kind out of all reason and would make it almost impossible for the State or landowner to make a proper showing as to valuation opinion within a reasonable time and at reasonable expense. Limiting a detailed account of these sales of comparable properties to cross-examination, where the factual specifics including such as were obtained from hearsay sources may be introduced into evidence for purposes of testing the reasons sustaining the opinion of value, is a guarantee against the proliferation of collateral issues with the jury, more nearly assures a proper evaluation and application of such evidence by the jury and adequately protects the adversary against surprise tactical advantage. Such evidence, in the instant case, excludable upon objection, but in fact admitted without objection, was not only "consent evidence" but proper evidence having probative value furnishing the foundation or the reasons for the ultimate opinion of the expert witness. There

was no error in the trial court's refusal to strike the opinion evidence of the Authority's expert.

Plaintiff contends that Kittery Electric Light Co. v. Assessors of Town, 1966, Me., 219 A.2d 728, compels a contrary ruling. We disagree. In Kittery we said that an expert witness may not give an opinion based in part on the opinions of others. In the reference case, the expert witness was testifying under the guise of his own opinion to the opinion of field investigators as to what properties in Kittery were fairly representative of a cross-section of the non-utility properties and were proper standards for determination of the actual tax assessment of non-utility property in Kittery bore to market value. To present to the jury someone else's opinion as the basis of the witness' own opinion by adoption would constitute an improper use of hearsay evidence. The wtiness' opinion must be hisown; he cannot act as a mere conduit for the opinion of others. See, Tigar v. Mystic River Bridge Authority, 1952, 329 Mass. 514, 109 N.E. 2d 148.

Ipsen v. Ruess, 1948, 239 Iowa 1376, 35 N.W. 2d 82; Mt. Royal Cab Co., Inc. v. Dolan, 1935, 168 Md. 633, 179 A. 54, 98 A.L.R. 1106; Zelenka v. Industrial Commission, 1956, 165 Ohio St. 587, 138 N.E. 2d 667; Glenn v. Dunean Mills, 1963, S.C., 131 S.E. 2d 696; Munro v. Houston Fire and Casualty Insurance Co., 1959, Texas, 329 S.W. 2d 326; 31 Am.Jur. 2d, Expert and Opinion Evidence, § 42; 32 C.J.S. Evidence, § 546 (63), p.268. See also, Farrington v. Maine State Highway Commission, 1963, 159 Me. 95 at page 96, 188 A.2d 483. But, the testimony of the Authority's expert in this instant case in no way offended the rule for which Kittery stands.

Lastly, plaintiff claims that her rights of due process were violated. It is difficult to pinpoint the exact grievance about which she complains concerning her constitutional privileges. Does she mean that she was entitled as a matter of constitutional right to have excluded from the evidence opinion testimony of value of the Authority's

expert because he based the same on factual data obtained from hearsay sources? If so, then we answer that the trial of the issue of just compensation for property taken in eminent domain proceedings under such rules of evidence as permit a qualified expert to predicate an opinion of value on factual data received from hearsay sources fully testable in cross-examination, is a proper substantial and efficacious judicial remedy to enforce the constitutional mandate of just compensation and plaintiff's claim of invidious deprivation of constitutional due process to the contrary is wholly untenable.

The condemnee has a vested right to be paid just compensation. The constitution so ordains. As a derivative thereof he is entitled to an efficacious remedy whereby such right may be substantially enforced. The evidence, which shall be received in the courts, and the effect of that evidence, lie within the powers of the State in regulating the remedy and mode of proceeding in its courts. See Oriental Bank v. Freese, 1841,

18 Me. 109; Ogden v. Saunders, 12 Wheat. 262.

There is no such thing as a vested right to a particular remedy. The form of administering right and justice may be altered. See Thayer & al. v. Seavey, 1834, 11 Me. 284 at page 288; Barton v. Conley, 1921, 119 Me. 581, 112 A. 670; Miller v. Fallon, 1936, 134 Me. 145, 183 A. 416.

The requirements of "due process of law" are satisfied when a remedial proceeding is available which provides for notice, opportunity for hearing and requires a judgment of some judicial or other authorized tribunal. McInnes v. McKay, 1928, 127 Me. 110, 141 A. 699; Inhabitants of York Harbor Village v. Libby, 1928, 126 Me. 537, 140 A. 382; Randall v. Patch, 1919, 118 Me. 303, 108 A. 97; Bennett v. Davis, 1897, 90 Me. 102, 37 A. 864.

Constitutional restrictions of due process undoubtedly would bar legislative or judicial deprivation of substantial vested rights, which

they were meant to protect, under the guise or form of a rule of evidence or procedure, but due process never did mean the loss by the legislative or judicial arms of government of their powers of regulation concerning the competency of witnesses or rules of evidence. See Wilson et ux v. Wilson, 1882, 86 Ind. 472; Little v. Gibson, 1859, 39 N.H. 505; Kozler v. New York Telephone Co., 1919, 93 N.J. Law 279, 108 A. 375.

In Cushman v. Smith, 1852, 34 Me. 247, at page 257, we said: "The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor."

The plaintiff takes nothing from the claim that her constitutional rights of due process were abridged unless the jury award is so inadequate that it fails to equate the just compensation required under our Constitution. Constitution of Maine, Art. I. § 21.

We recognize that the expert testimony as to the fair market value of the plaintiff's property was in sharp disagreement. From the record before us, we note that it ranged from $47,800, the estimate testified to by the Authority's expert, to $123,750, the final figure stated by Mr. Hobbs, the Plaintiff's value witness. Concededly, we have but a portion of the testimony reproduced for our consideration and there is no way of knowing whether the omitted evidence affected testimonial values to such an extent as to leave us with a distorted picture from what the jury had in their deliberations. It is apparent that the jury did not accept Mr. Hobb's opinion and that they were not the least impressed by his testimony. Still, this does not mean that they disregarded it completely. To segment the influential evidence that swayed the jury in assessing a fair market value of $60,000 upon the plaintiff's property and to demonstrate the collective mental processes used by them in solving the problem at hand, is an impossibility. However, we need

not do so. The competence, credibility, and weight of expert testimony is exclusively the province of the jury. It may be disbelieved in part or in whole. It is not binding on the jury. Kittery Electric Light Co. v. Assessors of the Town of Kittery, 1966, Me., 219 A.2d 728 at page 743. As instructed by the trial judge, the jury was not restricted to a choice between the estimates of the two warring experts and this Court as an appellate judicial tribunal cannot substitute its judgment for that of the jury in awarding just compensation in eminent domain proceedings. If the inadequacy of the award is not such as to indicate inherent taint of passion or prejudice, and is not shocking to an enlightened conscience having due regard for the constitutional mandate of just compensation, the jury verdict must stand. If there is any substantial evidence upon which the jury could have based its verdict, this court will not set aside the amount of the comdemnation award. We find that there was. We are satisfied that the sum total of the evidence

before the jury supports the verdict and we detect no evidence whatsoever that the jury award was brought about by reason of passion, bias or prejudice. See Farrington v. Maine State Highway Commission, 1963, 159 Me. 95, 188 A.2d 483.

The plaintiff has been awarded, within proper constitutional strictures, the just compensation to which she was entitled for the taking of her property. There is no error and the entry will be

Appeal denied.

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Q This is the whole thing. If there had been no sales of these properties, you would have no basis for any of your opinion.

A That's right.

Q You are depending entirely in all your opinion about values either land or buildings, upon these sales of what you considered to be comparable properties.

A My value conclusion regarding the buildings has nothing to do with these things.

THE COURT: We are talking land.

Q All right. But they do have about the land.

A Yes.

Q How did you arrive at your building value then?

A Primarily by using all three approaches -- primarily two. I used all three approaches, but primarily two.

Q You say you have a means -- you have established the values of these buildings without relying on these other sales?

A Without relying on these land sales.

Q All right. How did you do it?

A By the three approaches.

Q By the which?

A By the three approaches.

Q Well, tell us how you did it?

A I used the cost approach. Do you want me to --

Q By square foot or cubic foot basis?

A Square foot. I used the market data approach with comparable sales. And I used the income approach.

Q Then you did use comparable sales.

A Yes. Maybe I misunderstood your question. You were asking me about land -- these land sales. I did not base my buildings values on these land sales.

Q Not at all?

A Not on these land sales. I had comparable sales of buildings that I used for the building values.

Q All right. Now, you -- without these comparable sales you would not have arrived at building values you had.

A Yes, I would.

Q Tell us how you arrived at it without depending on these other sales?

A I used them on each approach.

Q That's what I say. You did use these comparable sales in outlying sections for determining value of the buildings.

A The building sales are not all in outlying sections, no, sir.

Q Well, let's say that the comparables you used, wherever they are, form the basis for your opinion of building value.

A Yes, sir.

Q And they also form your opinion -- form the basis for your opinion of land value.

A Yes, sir.

Q So that if these sales didn't take place your values wouldn't be accurate, they wouldn't mean anything.

A If they didn't take place?

Q Yes.

A I would have no comparable sales.

Q Fine. So, as a summary, and to be very sure we're clear, your opinion of market value of the land and buildings here is squarely based upon actual sales that you told about yesterday.

A Yes, sir.

Q Now, you say that you went to these various transactions from tips you received from someone. Is that what you testified to?

A That is how I found them originally, yes, sir.

Q All right. Now, if these people who led you to these properties by what you call tips were in error, then you are in error, is that right?

A I did not get the information about the sales --

Q No --

A -- from the person who gave me the tip, as you call it.

Q All right.

THE COURT: He called them leads. Which is it?

A I call them leads, yes.

Q I beg your pardon?

A I called them leads; you called them tips.

Q All right. Isn't it true that the one on Central Avenue

A No, sir. The values I arrived at were based on what I thought were comparable properties.

Q You have just stated it just right. You've stated what you said, you just thought. How did you arrive at the rental values of the comparable properties?

A I asked the people what the rent was.

Q So, if they didn't give you the right information, --

A I would be off base.

Q So, you are depending entirely on hearsay.

A Yes.

Q That's right, isn't it?

A Yes, sir.

Q And if that hearsay is in error, you're in error.

A Yes, sir.

THE COURT: Do you offer to prove that it is?

MR. DAVIAU: I beg your pardon?

THE COURT: Do you offer to prove that it is?

MR. DAVIAU: I can't with this witness, Your Honor.

THE COURT: I mean with any witness.

MR. DAVIAU: I think so.

THE COURT: If you can't -- well, counsel should not ask questions of the witness pre-supposing something different from his testimony, unless you offer to prove his testimony is wrong.

MR. DAVIAU: We will, Your Honor, we will.

Q Now, the dates of these various comparables -- the dates of

supposed sales of these various comparables --

MR. DAVIAU: And by the way, I would like to say for the record, Your Honor, the fact that I'm using these comparable sales doesn't mean that I'm agreeing of their evidence or what they purport to be. I don't want to waive our rights in that respect.

Q Some of those dated back to 1953, didn't they?

A I don't recall; I'd have to check.

MR. JOLOVITZ: Your Honor, my Brother has prefaced his whole case on comparables of the Perickles property that was sold to the City of Waterville in 1953. I don't think it's right to attack the age.

THE COURT: He isn't attacking it. He's probably trying to find out how far back this witness goes.

Q And --

MR. DAVIAU: Well, that's not the purpose of my question, Your Honor. The purpose will become clear now.

Q And you didn't make any adjustments of these supposed sales prices to the index value of the dollar as of January 1964, did you?

A No, sir.

Q And you do know, don't you, that property values have risen sharply in Waterville in the last several years, since any

Q Indispensable.

A It helps.

Q Now, isn't that based upon an assumption that this formula can be useful at all?

A I don't follow your question.

Q Isn't the gross multiplier approach based upon the assumption that the rentals were of fair market value?

A Yes.

Q They might not have been.

A Yes.

Q But you assume that they were.

A Yes.

Q So that if there was special circumstances or conditions that changed the rental, such as we say in our case, you wouldn't have correct figures, would you?

MR. JOLOVITZ: Objection, Your Honor. Again he is getting negative testimony in here.

THE COURT: If I understand the question he is saying that this witness has used in his income approach -- he has used the gross rent multiplier in connection with several comparables, have you not?

A Yes, sir.

THE COURT: And he did it after he was informed as to what the rents were and what the price the

property sold for. Correct?

A Yes, Your Honor.

THE COURT: All right. As I understand it, Mr. Daviau said if his information was incorrect, wouldn't that vary the results. He said, "Yes." If he was wrong about the rents, wrong about the sales price, then there's bound to be a variation in the estimates. Right?

A Yes, sir.

THE COURT: Now, again, unless you offer to prove, Brother Daviau, that his information that he got concerning the amount of the rent, the price paid is in error, then the cross examination is not proper. If to the extent you can upset his assumption, that is, as to rent and to the price it sold for, of course you are at liberty to do it. But not hypothetically.

Q So that your assumption in the gross multiplier is one assumption you had to make as you just discussed, as we have just discussed. Now, how about the front-foot price concept? You didn't ascribe the same value to the front foot of each of these comparables, did you?

A No, sir.

Q All right. Why?

A. Because I thought they had -- the land had different values.

(At the close of all the evidence and after the jury had been given the case in charge, the following proceedings were had in chambers and apart from the jury, and made to be entered in the record as per instructions of the Court with all counsel present and participating):

MR. DAVIAU:

Plaintiff seasonably during trial made a motion to strike the expert opinion of Heywood Sawyer on the grounds that the basic hearsay facts upon which he based his opinion is not found in the evidence and, therefore, that his opinion is without supporting evidence.

THE COURT:

The motion to strike is denied for, among other reasons, the same objection applies to much of the testimony given by Mr. Hobbs. In this case the Court probably relaxed the hearsay evidence rules for both sides because it was necessary in view of the difficulties all of the experts encountered in such matters as getting satisfactory comparables, and so forth.

MR. DAVIAU:

Now, an exception to the Court's instruction; by objection to that portion of the Court's charge that instructed the jury to consider Heywood Sawyer's opinion, it being without supporting evidence to be found in the case.

I S S U E S

(P. 3 of Plaintiff's Brief)

Was Heywood Sawyer's expert opinion admittedly based on hearsay, vulnerable to Motion to strike for lack of supporting evidence?

Did the ruling of the trial court, denying Plaintiff's Motion to Strike, deprive the Plaintiff of her rights to due process under the Federal Constitution of the United States?

Did the ruling of the Court denying the Plaintiff's requested instructions and permitting the jury to consider, in its deliberation Heywood Sawyer's opinion, it being without supporting evidence to be found in the case, deprive the Plaintiff of her right to due process under the Federal Constitution of the United States?

Did the rulings of the Court both as to the admission of the expert opinion of Heywood Sawyer and instructions to the jury deprive

the Plaintiff of her rights to just compensation under the Constitution of the State of Maine?

Was the Plaintiff accorded a fair trial of her rights to just compensation, as guaranteed her by the Constitution of the State of Maine?

Was the Plaintiff accorded a fair trial of her rights to just compensation guaranteed her under the due process clause of the Federal Constitution of the United States?

MASON, *Administrator*, *versus* TALLMAN.

There are cases, in which a party may, *by his own affidavit*, show to the Court that a paper has been lost, in order to the introduction of secondary evidence to prove its contents.

In no case, however, is such an affidavit receivable as evidence of any fact for the consideration of the *jury*.

When a question, made by one party, has been but partly answered by the witness, the residue of the answer may be elicited on inquiries by the other party.

An inference founded upon hearsay is no more admissible in evidence, than a fact obtained in like manner would be.

ON EXCEPTIONS from *Nisi Prius*, HOWARD, J. presiding.

ASSUMPSIT. The first count was for $4000, money had and received of the intestate. The second count charged that at different times the intestate had lent and advanced to the defendant various sums, amounting in all to $4000, for which the defendant had given his promissory notes, yet unpaid and now lost by inevitable accident. The third count charged the same loans, and that notes were given therefor, and that the intestate was afterwards drowned at sea by the foundering of the ship Michigan, upon which occasion the notes were lost and destroyed. At the commencement of the trial the last two counts were stricken out. A witness for the plaintiff, testified that the plaintiff's intestate, was a shipmaster, and sailed with his wife for Europe upon a voyage from which neither he or the wife or the ship ever returned; that just prior to sailing upon the voyage, he placed $200 in the hands of the witness for the defendant, which

examination at that time what in your judgment was his (the pauper's) mental condition?" From the manner in which the point is presented to us by the case, we think the ruling must stand.

We infer that the witness was not allowed to answer the question for the reason that the judge did not think him qualified to testify as an expert. Such must be the implication of the refusal, unaccompanied with explanation. Undoubtedly many physicians are qualified to testify as experts upon questions of insanity. They may not be, as a rule, of the most eminent class of experts. Whether this witness was qualified to testify as an expert, was a question of fact for the presiding judge, and his decision of such a question is usually final. In extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed. This is not such an instance.

The plaintiffs contend that, if not admitted as a professional or practical expert, the witness should have been allowed to express his opinion as a physician who had made a personal examination. The rule excluding persons not experts from testifying to their opinions upon questions where insanity is alleged, has admitted, either as an illustration of the rule itself or as an exception to it, skillful and reputable physicians to testify to the mental condition of their patients when they have had adequate opportunity of observing and judging of their mental qualities. That is not this case. Here Dr. Martin was not an attending physician. He made a single examination, *pendente lite*, in order to inform himself as a witness. He stood in a position to be tempted to participate in the prejudices of the party calling him as a witness. See *Gardiner* v. *Farmingdale*, 45 Maine, 537.

Finally, it is contended that the rule which excludes opinion evidence by witnesses acquainted with the person whose sanity is questioned, should be abrogated altogether. We are not prepared to admit the propriety of so radical a change in the practice of our courts, although we are aware that many courts

hearsay evidence and must fall within the hearsay rule. They were but repeating that certain persons in the community had informed them [illegible] believed the defendant was keeping a tippling shop. The witnesses apparently did nothing to verify this information and so far as appears the information, itself, might have been based upon hearsay.

It may be regarded as a fair presumption that the officers, who testified to the complaints made to them, well knew the name and place of residence of the complainants. Accordingly, the original sources, from which the complaints must have come, were presumably within the easy procurement of the officers. But it does not appear that they or the State, made any effort to obtain the presence of their informers as witnesses at the trial. These facts clearly bring the case within the hearsay rule, as stated in *Gould* v. *Smith*, 35 Maine, 513, as follows: "Hearsay, as a general rule, is not evidence. To this rule, however, there are exceptions, under which to prevent an entire failure of justice; and when no better evidence can be supposed to exist, it is admitted. But when, from the nature of the testimony offered, it is manifest that better evidence exists and is accessable, it is not admissible." This is the general rule adopted by every common law jurisdiction, and every text writer on evidence, so far as we have been able to discover. From the evidence of complaints the jury at most could only draw an inference as to the truth of the charge made in the indictment. But as was said in *Mason* v. *Tallman*, 34 Maine, 472: "An inference founded upon hearsay is not more admissible in evidence than a fact obtained in a like manner." It is unnecessary to go farther. There is no rule under which the testimony in question was admissible.

But it is claimed that, even though the testimony was inadmissible, it was not prejudicial to the rights of the defendant. We can conceive of a case, in which this contention might prove true, but in the case before us there is nothing stated in the exceptions, and there is no further report of the evidence, which warrants this conclusion.

Exceptions sustained.

§ 10. Restrictions upon powers of states

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

5. Reciprocal enforcement of support

The Uniform Reciprocal Enforcement of Support Act (19 M.R.S.A. § 331 et seq.) has been declared by the courts of several states not to violate this amendment. (1956) 4 Portland L.Rev. 50.

AMENDMENT [VII.]

Civil trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

land, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

old fixed tradition that a criminal trial must be finished in one sitting. The necessary sifting of testimony by cross-examination took double and treble the time used of yore. Under vast inconvenience, the old tradition was preserved, until at last it gave way, from very exhaustion, to the new necessities.[65]

What we find, then, in the development of the Hearsay rule is: (1) A period up to the middle 1500s, during which no objection is seen to the use by the jury of testimonial statements by persons not in court; (2) then a period of less than two centuries, during which a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their trustworthiness by means of cross-examination; (3) Finally, by the beginning of the 1700s, a general and settled acceptance of this rule as a fundamental part of the law.[66] Such, in brief, seems to have been the course of development of that most characteristic rule of the Anglo-American law of evidence,—a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure.

§ 1365. **Cross-Examination and Confrontation.** The essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of Cross-examination. But a process commonly spoken of as Confrontation is also often referred to as an additional and accompanying test or as the sole test. Now Confrontation is, in its main aspect, merely another term for the test of Cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i.e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable. The details of this distinction are elsewhere to be examined (*post*, § 1395); it is enough to note here that, so far as confrontation is an indispensable element of the Hearsay rule, it is merely another name for the opportunity of cross-examination.

[65] "Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 A. M., the Court having sat from 8 P. M. the previous day. In 1794, in Hardy's case, the Court sat from 8 till past midnight" (Sir H. B. Poland, A Century of Law Reform, 1901, p. 63); Until the trial of Hardy, in 1794, "there had not yet been an instance of a trial for high treason that had not been finished in a single day" (Campbell, Lives of the Chancellors, 5th ed., VIII. 307). Compare the citations *post*, § 1864.

[66] It therefore does not date back so far as our judges have sometimes fondly predicated,—"to Magna Charta, if not beyond it," for instance (Anderson v. State, 89 Ala. 12, 7 So. 429; 1890).